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IN THE

Supreme Court of the United States

UNITED STATES SHOE CORP.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS IN SUPPORT OF THE PETITIONER

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INTEREST OF *AMICUS CURIAE*

The American Association of Exporters and Importers ("AAEI"), by its filing of this brief as *amicus curiae*, respectfully urges this Court to grant the petition for a writ of certiorari.[1]

Founded in 1921, AAEI is a national association of over 1,000 U.S. firms that are involved in exporting products from, and importing products into, the United States. AAEI's member companies export, import, distribute and manufacture a broad range of products, including chemicals, electronics, machinery, footwear, automobiles and parts, food, household consumer goods, toys, specialty items, textiles and apparel. In addition, many organizations serving the international trade community, including customs brokers, freight forwarders, banks, attorneys, insurance firms and carriers, are active members of AAEI.

AAEI is often called upon by Congressional committees to offer its technical expertise on policy and regulatory matters impacting global commerce. The Association and its member companies have an abiding interest in U.S. laws affecting international trade and their adherence to the Constitution. This case is significant for AAEI because many of its exporter members have obtained refunds of unconstitutionally exacted Harbor Maintenance Taxes

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1. Petitioner has filed a global consent to the submission of *amicus curiae* briefs in support of either party, which is on file with the Clerk. Respondent's letter consenting to the filing of this brief accompanies this filing. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

("HMT") under this Court's decision in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), but have been denied interest on those refunds based on the decision of the United States Court of Appeals for the Federal Circuit below, in *United States Shoe Corp. v. United States*, 296 F.3d 1378 (Fed. Cir. 2002).

While AAEI endorses all of the arguments raised by U.S. Shoe in its petition, it confines its discussion in this brief to the Export Clause of the Constitution as a basis for interest on HMT refunds.

SUMMARY OF THE ARGUMENT

The United States' general immunity from the payment of interest absent a waiver of sovereign immunity to such an award does not apply when the Government is required to pay interest under the Constitution.

This Court has consistently held that the Takings Clause of the Fifth Amendment requires the payment of interest, a result grounded in this Court's underlying determination that "just compensation" for a governmental taking of private property must be the "full and perfect equivalent for the property taken." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893). That determination is itself a reflection of the fact that the restriction on Congress' power contained in the Takings Clause "must be enforced according to its letter and spirit and to the full extent." *Fairbank v. United States*, 181 U.S. 283, 301 (1901).

This Court has similarly emphasized that the restriction in the Export Clause — "No Tax or Duty shall be laid on Articles exported from any State" — "should be enforced in

accordance with its letter and spirit," *Fairbank*, 181 U.S. at 290, with the "aim[] ever to show fidelity to the * * * purpose" of this provision. *Id.* at 289. A Government response to a violation of the Export Clause that consists of a refund of tax principal as required under the Clause, but without interest, violates the letter and spirit of the Export Clause no less than a Government payment without interest violates the letter and spirit of the Takings Clause.

The Export Clause was intended to ensure (1) "that exports should not be made a source of revenue to the National Government," and (2) "that the National Government should put nothing in the way of burden upon such exports." *Fairbank*, 181 U.S. at 292-93. Application of the no-interest presumption violates both purposes, as this case profoundly illustrates. Although refunds of the HMT principal were issued following this Court's unanimous decision, earlier in this case, that the tax violated the Export Clause, exporters have borne the burden of $700 million in lost interest on sums that should never have been taxed in the first place, while the Government has retained millions of dollars in interest that it earned on the HMT. Thus, the Federal Circuit's decision allows the Government to extract what amounts to interest-free loans from exporters — a clear subversion of the letter and spirit of the Export Clause. Accordingly, review by this Court of the Federal Circuit's decision is necessary.

ARGUMENT

I. The Government's Immunity From The Payment Of Interest Is Inapplicable When Interest Is Required Under The Constitution.

Generally speaking, the United States is immune from a requirement to pay interest unless Congress has waived its sovereign immunity to such an award separate from a general waiver of immunity to suit. *See, e.g., Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986). However, as this Court has observed, the "no-interest" rule does not apply when the Government is required to pay interest under the Constitution. *E.g., id.* at 317 ("*Apart from constitutional requirements*, in the absence of specific provision by contract or statute, or 'express consent * * * by Congress,' interest does not run on a claim against the United States.") (emphasis added) (quoting *United States v. Louisiana*, 446 U.S. 253, 264-65 (1980), quoting *Smyth v. United States*, 302 U.S. 329, 353 (1937)). Indeed, although this Court has previously denied requests for interest on the ground that the Government did not waive its immunity,[2] none of those cases involved a violation by the Government of a constitutional provision.

No provision of the Constitution expressly requires the payment of interest. This Court, nonetheless, has consistently held that a waiver of immunity from interest is unnecessary

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2. *E.g., Shaw*, 478 U.S. at 323; *United States v. Louisiana*, 446 U.S. at 264-65; *United States v. Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951); *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 47 (1928); *United States v. North American Transp. & Trading Co.*, 253 U.S. 330, 335-36 (1920); *United States ex rel. Angarica v. Bayard*, 127 U.S. 251, 260 (1888); *Harvey v. United States*, 113 U.S. 243, 249 (1885); *United States v. Sherman*, 98 U.S. 565, 568 (1878).

under the Takings Clause of the Fifth Amendment, which provides, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. *See, e.g.*, *Jacobs v. United States*, 290 U.S. 13, 16-17 (1933) (citing cases). Despite dicta in a few cases that the Takings Clause is the only constitutional provision whose violation gives rise to interest,[3] this Court has never held that the Government's immunity from interest extends to other provisions of the Constitution, let alone a violation of the Export Clause, whose "simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority." *United States v. United States Shoe Corp.*, 523 U.S. 360, 368 (1998) ("*U.S. Shoe I*"). The Federal Circuit's decision, which extends the Government's immunity from interest to the Export Clause, radically undercuts the unqualified protection that the Framers afforded exports by virtue of this Clause, and it should therefore be reviewed by this Court.

II. Interest On Refunds Of Unconstitutionally Exacted Harbor Maintenance Taxes Is Required To Fulfill The "Letter and Spirit" Of The Export Clause.

A. This Court Has Made Clear That The Export Clause Should Be Construed Broadly To Ensure That Congress Neither Burdens Exports Nor Benefits Financially By Taxing Them.

The Export Clause states: "No Tax or Duty shall be laid on Articles exported from any State." U.S. CONST. art. I, § 9, cl. 5. The inclusion of the Export Clause in the Constitution was one of the most important and actively debated issues

3. *See Shaw*, 478 U.S. at 317 & n.5; *Tillamooks*, 341 U.S. at 49; *Boston Sand*, 278 U.S. at 47.

at the Constitutional Convention of 1787. "We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution." *Fairbank v. United States*, 181 U.S. 283, 290 (1901).

Several delegates refused to vote in favor of the Constitution if the Clause was not included. *See* Madison's *Notes of Debates in the Federal Convention*, reproduced in 2 Max Farrand, *The Records of the Federal Convention of 1787*, at 95, 360 (rev. ed. 1966). Others declared that they would vote to grant Congress the power to tax only if exports were exempted entirely. *See id.* at 305-06. Despite opposition, *id.* at 223, and attempts to limit the exemption, *id.* at 359-63, the Export Clause was adopted as an absolute prohibition against any tax or duty on exports. *See id.* at 220 ("the hands of the Legislature were absolutely tied * * * — exports could not be taxed") (statement of Rufus King of Massachusetts); 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1011, at 470 (1833) ("Story *Commentaries*") ("The power is, therefore, wholly taken away to intermeddle with the subject of exports.").

Thus, over a century ago, this Court observed that

> the purpose of the restriction is that exportation, all exportation, shall be free from national burden. * * * [I]t is clear that the framers of the Constitution intended not merely that exports should not be made a source of revenue to the National Government, but that the National Government should put nothing in the way of burden upon such exports.

Fairbank, 181 U.S. at 292-93. The *Fairbank* Court emphasized that this "restriction on the power of Congress

* * * should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed." *Id.* at 290.

B. The Federal Circuit's Denial Of Interest Based Upon A Narrow Reading Of The Export Clause Is Contrary To This Court's Construction Of The Clause And Enables Congress To Thwart The Framers' Intent.

Ignoring this Court's admonition that the Export Clause should be enforced with its purpose kept squarely in mind, the Federal Circuit interpreted the Export Clause *narrowly* and held that, even though "a violation of the Export Clause requires a return of the money excised," it does not require the payment of interest. *United States Shoe Corp. v. United States*, 296 F.3d 1378, 1385 (Fed. Cir. 2002) ("*U.S. Shoe II*"). The court endorsed an incomplete monetary remedy and distinguished the Export Clause from the Takings Clause on the ground that the prohibition in the Takings Clause "is coupled with the restorative clause, 'without just compensation,'" whereas the Export Clause's prohibition "lacks similar remedial language." *Id.* (citation omitted). The Federal Circuit was "unwilling" to infer a requirement to pay interest under the Export Clause, "where the word 'compensation' does not appear." *Id.*

The Federal Circuit's denial of interest based on its narrow, mechanical reading of the Export Clause is at odds with this Court's recognition that the Export Clause is to be given a broad construction in order to fulfill its purpose:

> [I]f the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally

> imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed and that language of restriction is to be narrowly and technically construed. * * * The true spirit of constitutional interpretation in both directions is to give full, liberal construction of the language, aiming ever to show fidelity to the spirit and purpose.

Fairbank, 181 U.S. at 289.

Far from being distinguishable from the Export Clause, the Takings Clause requires the payment of interest based on this same principle. In *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), this Court recognized that "just compensation" required under the Fifth Amendment in the event of a governmental taking must be the "full and perfect equivalent for the property taken." *Id.* at 326.[4] Applying *Monongahela*, this Court subsequently determined that "the full equivalent of that value paid contemporaneously with the taking" must include interest. *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 (1923). As the *Fairbank* Court noted, *Monongahela* simply recognized in the context of the Takings Clause what *Fairbank* recognized in the context of the Export Clause: "In short, the court held in [*Monongahela*] that Congress could not by any declaration

4. The Court noted that even "if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property." 148 U.S. at 326.

in its statute avoid, qualify or limit the special restriction placed upon its power, but that it must be enforced according to its letter and spirit and to the full extent." 181 U.S. at 301. Thus, when this Court held in *Seaboard Air Line* that "just compensation" must include interest, it, like the *Monongahela* Court before it, was simply enforcing the Takings Clause "according to its letter and spirit and to the full extent." *Fairbank*, 181 U.S. at 301.

Interest is required to fulfill the letter and spirit of the Export Clause no less than it is required to fulfill the letter and spirit of the Takings Clause, even though the Export Clause does not, as the Federal Circuit noted, contain the word "compensation." By levying an unconstitutional tax on exports and then refusing to pay interest on refunds of the money unlawfully exacted — refunds that even the Federal Circuit agrees are required notwithstanding the absence of express remedial language in the Export Clause — the Government has, contrary to the clear intent of the Framers, made exports "a source of revenue to the National Government" and put a "burden upon such exports." *Fairbank*, 181 U.S. at 292-93. Far from a hypothetical concern, this is *precisely* what unfolded in this very case. Even after the refund of the HMT principal,[5] the withholding of interest has resulted in the loss of some *$700 million* from the pockets of exporters, while at the same time the Government has retained millions of dollars in interest that *it* earned on the HMT principal prior to its refund. Consistent with "the great principle that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result,"

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5. Thousands of HMT claimants are, in fact, still awaiting a full refund, much less interest.

Fairbank, 181 U.S. at 294, just as the Government may not burden exports or benefit financially by imposing the HMT itself, it may not do so by refusing to pay interest on HMT refunds.[6]

The Federal Circuit's decision enables the Government to easily circumvent the purpose of the Export Clause, secure in the knowledge that it may enact a tax on exports, enjoy the fruits of its ill-gotten gains for many years, and, at the end of the day, have to refund the principal alone. The Federal Circuit thus approved the Government's extraction of interest-free loans from exporters and, in the process, created a most bizarre constitutional scheme: When the Government takes private property for public use — conduct that is *not prohibited* under the Constitution — it must pay interest as part of the compensation required to be paid, but when it taxes exports — conduct that is *categorically barred* under the Constitution — the Government need not pay interest when it issues the constitutionally required refund of taxes. Surely the Framers, who understood that they had "wholly taken away [Congress' power] to intermeddle with the subject of exports," Story *Commentaries* § 1011, at 470, would not have countenanced such a scenario.

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6. By contrast, the Government presumably could maintain immunity from interest in cases arising under *other* constitutional provisions which, unlike the Export Clause, do not, by their own terms, explicitly or implicitly include a monetary remedy. The Federal Circuit has held that numerous constitutional provisions are not money-mandating. *E.g.*, *Brown v. United States*, 105 F.3d 621, 623 (Fed. Cir. 1997) (Fourth Amendment); *LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (Due Process Clauses of Fifth and Fourteenth Amendments, Equal Protection Clause of Fourteenth Amendment, and separation of powers doctrine); *United States v. Connolly*, 716 F.2d 882, 887 (Fed. Cir. 1983) (First Amendment); *Terran v. Secretary of Health and Human Serv.*, 195 F.3d 1302, 1310 (Fed. Cir. 1999) (Presentment Clause).

C. The Federal Circuit's Narrow Reading Of The Export Clause Cannot Be Reconciled With This Court's Broad Reading Of The Clause In Its 1996 *IBM* Decision Or Its Decision In *U.S. Shoe I*.

The Federal Circuit mistakenly concluded that its treatment of the Export Clause is supported by this Court's decision in *United States v. International Bus. Mach. Corp.*, 517 U.S. 843 (1996). Citing the absence of the word "compensation" from the Export Clause, the Federal Circuit denied interest on HMT refunds on the ground that it was "follow[ing] the express textual command of the Export Clause." *U.S. Shoe II*, 296 F.3d at 1385 (quoting *IBM*, 517 U.S. at 862). The court's assumption that the "express textual command" of the Export Clause should be read narrowly is incorrect, *see* discussion *supra*, and, in fact, *IBM* itself confirms just the opposite. *See* 517 U.S. at 859-60 ("While the original impetus may have had a narrow focus, *the remedial provision that ultimately became the Export Clause does not*, and there is substantial evidence from the Debates [in the Constitutional Convention] that proponents of the Clause fully intended the breadth of scope that is evident in the language.") (Emphasis added).

Nor is the Federal Circuit's narrow reading of the Export Clause supported by its reliance on the *IBM* Court's observation that there is "good reason to hesitate before adopting the analysis of our recent Import-Export Clause cases into our Export Clause jurisprudence" because "[m]eaningful textual differences exist [which] should not be overlooked." *U.S. Shoe II*, 296 F.3d at 1385-86 (quoting *IBM*, 517 U.S. at 857). As the *IBM* Court noted, those textual differences were meaningful because they confirmed that the Export Clause affords *broader* protection to exports than does

the Import-Export Clause. *See* 517 U.S. at 857 (noting that "the Import-Export Clause is 'not written in terms of a broad prohibition of every 'tax,'" but merely prohibits State "imposts" and "duties" on exports, which "are narrower terms than tax") (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 290 (1976)). Thus, in its earlier decision in this case, this Court quoted the very language from *IBM* upon which the Federal Circuit relied, but for a contrary proposition: to illustrate that the breadth of the Export Clause prohibition "distinguishes it from other constitutional limitations on governmental taxing authority," *U.S. Shoe I*, 523 U.S. at 368, and thus renders it a more stringent limitation on governmental exactions than either the Takings Clause or the Dormant Commerce Clause. *Id.* at 368-69. The Federal Circuit violated that decree by depriving the Export Clause of the power imbued in the Takings Clause to negate the presumption of immunity from interest. The result created by the Federal Circuit's decision is therefore plainly anomalous: How can the Export Clause constitute a more stringent limitation on governmental exactions than the Takings Clause if only the Takings Clause prevents the Government from depriving people of the interest on such exactions?

D. A Lower Court's Award Of Interest To Federal Judges Under The Compensation Clause Persuasively Illustrates That The Rationale For Interest May Be Extended To Certain Constitutional Provisions Other Than The Takings Clause.

The reasoning of a decision by the United States Court of Federal Claims supports U.S. Shoe's argument that the rationale for interest under the Takings Clause applies with equal force under certain other provisions in the Constitution.

In 1997, that court held that the United States owed interest on a tax refund to federal judges under the Compensation Clause, U.S. CONST. art. III, § 1, when their salaries were unconstitutionally diminished by social security taxes in violation of that Clause. *See Hatter v. United States*, 38 Fed. Cl. 166, 181-83 (1997). After observing that both the Takings Clause and the Compensation Clause are constitutional provisions requiring the payment of compensation, the court concluded: "If recompense for delay in compensation is required for takings claimants despite the general rule, surely the federal judge whose constitutionally protected compensation is delayed is at least equally entitled to such recompense." *Id.* at 182.[7]

The Federal Circuit assumed *arguendo* that *Hatter* was correctly decided, but it distinguished that case on the ground that "[t]he construction of the Export Clause differs from the Compensation Clause. The Export Clause is prohibitive, 'No Tax or Duty shall be laid on Articles exported from any State,' while the Compensation Clause requires that judges shall receive 'Compensation.'" *U.S. Shoe II*, 296 F.3d at 1385. This reasoning is unsustainable. Even the Federal Circuit has had no difficulty acknowledging that the Export Clause restriction on taxing power requires Congress to refund money obtained in violation of the Clause, and a refund of export taxes without interest is no more an adequate response to a violation of the Export Clause than the payment of

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7. As the Federal Circuit noted in this case, the Government did not appeal the Court of Federal Claims' award of interest in *Hatter*. Upon the Government's appeal of a subsequent decision on the merits of the judges' action under the Compensation Clause, this Court struck down the 1983 imposition of social security taxes on the judges' salaries, ensuring that the judges will receive refunds of those taxes plus interest. *United States v. Hatter*, 532 U.S. 557 (2001).

compensation without interest is an adequate response to a governmental diminution of judicial salaries. Only the payment of interest will ensure that the Government cannot circumvent the mandatory and unconditional prohibition contained in each Clause.

The Federal Circuit also distinguished *Hatter* on the ground that the Court of Federal Claims' rationale, that interest is required under the Compensation Clause to maintain the separation of powers, "does not apply to the Export Clause." *U.S. Shoe II*, 296 F.3d at 1385. The Federal Circuit made the wrong inquiry. It is not whether interest under the Export Clause would fulfill the *same* purpose that it fulfills under the Compensation Clause; clearly, the two Clauses were adopted for different reasons. Rather, the pertinent question is whether the purpose of the *Export Clause* would be defeated if the no-interest presumption were applied to that Clause. The Federal Circuit's denial of full monetary redress, *i.e.*, tax principal plus interest, for the Government's violation of the Export Clause substantially impairs the capacity of the Export Clause to achieve its purpose. In this sense, the Export Clause parallels both the Takings Clause and the Compensation Clause.

CONCLUSION

For the foregoing reasons, *amicus curiae* American Association of Exporters and Importers respectfully urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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